IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1119

CERTIFIED OIL COMPANY INC., Bankrupt,
and HAROLD F. FISHBECK,
Petitioners,

—against—

GEORGE J. RUDNICK and HARRY RICE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

GEORGE J. RUDNICK,
Counsel for Respondents.

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STATEMENT.

(Figures in parentheses refer to folio numbers in printed record.)

All the pertinent facts are contained in the opinion of the Circuit Court of Appeals in support of its mandate, dated December 10, 1946, by which it reversed the order of the District Court and remanded the cause for further hearing. The District Court had expunged the claim filed by the respondents.

POINT I.

THE ORDER OF THE CIRCUIT COURT OF APPEALS IS INTERLOCUTORY AND CERTIORARI SHOULD NOT BE GRANTED TO REVIEW SUCH AN ORDER.

Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal

to this Court until a litigation has been concluded in the courts below. Only in very few situations, where intermediate rulings may carry serious public consequence, has there been a departure from this requirement of finality for federal appellate jurisdiction. (*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123-124.) The foundation of this policy is not in merely technical conceptions of finality. It is one against piecemeal litigation. "The case is not to be sent up in fragments." (*Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341.) Reasons other than the conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals. (*Catlin* v. *United States*, 324 U. S. 229, 233-234.) To be appealable to this Court, the judgment or decree must not only be final, but complete, not only as to all the parties, but as to the whole subject matter. (*Collins* v. *Miller*, 252 U. S. 364, 370.) Where an appellate court refers a question in the case to the subordinate court for further judicial action, its judgment is not final for the purpose of an appeal or writ of error to this Court. (*Martinez* v. *Inter. Banking Corporation*, 220 U. S. 214, 223; *Slaker* v. *O'Connor*, 278 U. S. 188, 189.) Until the trial court by its order accepts or rejects the claim of the creditor-respondents and complies with the other directions contained in the mandate of the Circuit Court of Appeals, it cannot be said that a final decree has been entered in the cause. The mandate in the proceeding under consideration remanded the cause for further proceedings in order that the rights of the parties might be thereafter finally passed upon.

In no reported bankruptcy case has this Court granted certiorari prior to final judgment or order in the Circuit Court of Appeals. While the Court may have power to issue the writ before final judgment or order, this case raises no question of grave public importance sufficient to justify the exercise of that power.

POINT II.

THE ABSENCE OF THE AFFIDAVIT REQUIRED BY GENERAL ORDER 21, SUBDIVISION 3, IS NOT FATAL TO THE CLAIM. THE ORAL TESTIMONY ALREADY SUBMITTED TAKES THE PLACE OF THE AFFIDAVIT REQUIRED. THE ADDITIONAL EVIDENCE OFFERED TO SUBSTANTIATE THE CLAIM SHOULD HAVE BEEN RECEIVED AND, IF RECEIVED, WOULD HAVE PROVED BEYOND QUESTION THE MERIT OF THE CLAIM.

The claim against the bankrupt was filed in November 1943 and set forth the true consideration for the debt, that no part thereof had been paid, and that it was entirely unsecured. It recited the facts in detail sufficient to give the bankrupt and other creditors the opportunity to investigate the fairness and legality of the claim. It was based on facts which are not in dispute and which were contained in the books and records of the bankrupt and of Natural. Unfortunately, the books and records of the bankrupt, who is the only remaining objectant to this claim (all other creditors having been paid according to the bankrupt's own contention), have never been produced by it in this bankruptcy proceeding. Why they have not been produced has not been explained. Such an objectant should not be looked on with favor by any court. It is because the bankrupt is seeking to cover up this glaring non-production of all its books and records that it seeks to expunge this claim on the basis of alleged technical defects.

Insofar as pertinent, General Order 21, subdivision 3, provides:

> "If a claim has been assigned after the commencement of the proceedings but before proof of claim has been filed, the proof of claim therefor shall be supported by an affidavit of the owner at the time of the commencement of proceedings, setting forth the true consideration for the debt, what payments have been

made thereon, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. * * *"

The purpose of this General Order is to assure possible objectants in a bankruptcy proceeding that, if the proof of claim is made by an assignee, it shall contain the same information regarding consideration for the debt, payments thereon, and security, if any, as if the proof were made by the original creditor under the provisions of Section 57a of the Bankruptcy Act. In the usual case, the assignee is without knowledge as to the origin of the basic claim and, therefore, the General Order seeks to supply that deficiency by a requirement that the affidavit of the assignor shall contain that information. But where the information is known to the assignees and is based on the books and records of the assignor, on other documentary evidence, and on facts which are not in dispute, the purpose of the General Order is fulfilled and the spirit of the order is complied with even if the affidavit of the assignor is not supplied.

The attorney for the bankrupt has consistently refused to "get involved in a hearing on the merits" (221), *i.e.* as to the claim due to Natural (the assignor) from the bankrupt which had been assigned to the claimants. The claimants have insisted on their right to prove the merits of their claim. It would be a shocking injustice to have the claim expunged merely because of the refusal of a hostile assignor to sign an affidavit.

The purpose of the filing of the affidavit is so that the statement of the consideration should be sufficiently specific and full to enable other creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim. (*Matter of Scott*, 73 F. 418.) It must give facts in regard to the claim which will enable the trustee and creditors to investigate and ascertain the adequacy of the consideration and the justice and legality of the claim. (*Matter of Coventry Evans Furniture Co.*, 166 F. 516.) It is the consideration for the claim owing by the bankrupt to Natural which

is of importance. The consideration for the assignment by Natural to the claimants is entirely irrelevant.

Here the facts recited in the proof of claim meet all the requirements, except that the affidavit is by the claimants rather than by the assignor. Where the purpose of the order is fulfilled, the one who makes the affidavit is of no consequence.

Where the proof of claim is defective as not complying strictly with the requirements of Section 57a of the Bankruptcy Act, the Referee must allow the claim to be corrected by amendment or established by proof. When the claim is thus established by proof, the testimony and evidence is regarded as written into the claim and the requirements of the statute are satisfied.

In *Hutson* v. *Coffman* (100 F. 2d 640, C. C. A. 9) claimant filed a defective proof of claim because it failed to itemize the consideration for the debt, as required by Section 57a of the Bankruptcy Act. The Circuit Court of Appeals held that, because the claimant introduced no evidence in support of his claim at the hearing on the objections of the trustee to the allowance thereof, the claim was properly disallowed.

In *West Hills Memorial Park* v. *Doneca* (131 F. 2d 374, C. C. A. 9) the Circuit Court of Appeals distinctly held (p. 376) that a deficient claim may be made satisfactory by evidence submitted.

On objection to a claim, the Referee *must* allow the claim if it is corrected by amendment *or* established by proof. (*Matter of Coventry Evans Furniture Co.*, 166 F. 516). The cited case holds that, where the filed claim does not comply with the requirements of the Bankruptcy Act, it is incumbent on the Referee to permit the claimant to establish his claim by such legal evidence that he may submit and thereupon the Referee must make such order as the facts and law warrant.

Where the defects of the claim are thus supplemented by oral testimony and such other evidence as may appear before the Referee, this testimony and evidence is regarded as

written into the claim, and both the written claim and the testimony and evidence then constitute the claimant's claim. (*Matter of Welborne,* 266 F. 385.)

In this case we have been permitted to witness the farce of the president of the assignor testifying in favor of the bankrupt against the claim which he, as president, assigned when, as a matter of law, the assignor warrants that he will do nothing to defeat or impair the value of the assignment (Restatement, Contracts, § 175, subd. 1a); when, as a matter of law, the assignor warrants that the right, as assigned, actually exists and is subject to no limitations or defenses other than those stated or apparent at the time of the assignment (Restatement, Contracts, § 175, subd. 1b); when, as a matter of law, the assignor is estopped from denying the validity of the assignment (*Roorbach* v. *Dale,* 6 Johns. Ch. 469); when, as a matter of law, the assignor warrants that the claim assigned is a valid subsisting obligation (*Sanders* v. *Aldrich,* 25 Barb. 63, 69); and when, as a matter of fact, Rodman himself was the assignee of a one-third share of the proceeds of the recovery on the assigned claim.

It is clear from all of the foregoing that the absence of the affidavit of the assignor is not fatal to the claim since the purpose of the General Order—to give possible objectants sufficient information to investigate the facts and legality of the claim—has been fulfilled in this case. Furthermore, the oral testimony already submitted substantiates the facts of the claim and may be regarded as written into the claim and to take the place of the affidavit of the assignor. Lastly, the books and records of the assignor, and other testimony offered by the claimants, should have been received and, if received, would have satisfied the purpose and spirit of the General Order and would have showed the merit of the claim.

The District Judge has already held that the objectant has not produced sufficient evidence to overcome the proof of claim (191). The objectant never produced any further evidence.

The order of the District Court was properly reversed by the Circuit Court of Appeals on the grounds, as stated in the opinion, that [1] it is apparent that the claimants could not, by the exercise of due diligence, have produced an affidavit which complied with the General Order; [2] the proof of claim filed contained all the information required under the General Order and there is no suggestion that the bankrupt and its creditors have been prejudiced by the absence of any data; and [3] under the circumstances, full literal compliance with the General Order was excused.

POINT III.

NEITHER OF THE PETITIONERS IS IN A POSITION TO CLAIM (1) THAT THERE WAS AN ABSENCE OF CORPORATE ACTION BY NATURAL AUTHORIZING THE ASSIGNMENT; (2) THAT ONLY RODMAN, PRESIDENT OF NATURAL, RECEIVED A PERSONAL BENEFIT FROM THE ASSIGNMENT; (3) THAT RODMAN HAD NO ACTUAL OR APPARENT AUTHORITY TO MAKE THE ASSIGNMENT; AND (4) THAT THERE WAS NO CONSIDERATION RUNNING FROM THE CLAIMANTS TO NATURAL FOR THE ASSIGNMENT.

Those objecting to the $21,000 claim filed by respondents are the petitioners—the bankrupt and one Fishbeck, an alleged creditor in the sum of about $80. Not only is Fishbeck's claim disputed, but the bankrupt's attorney repeatedly insisted that there was no other creditor in the estate except the claimants (521). Therefore, the alleged objecting creditor, has no standing since he is no longer a creditor. In any event, Fishbeck claims he is a creditor of the bankrupt and not of Natural. Fishbeck is a total stranger to Natural and to the transaction here involved.

Both the bankrupt and Natural are New York corporations. The assignment was made in New York. Therefore, New York law governs this transaction.

1. Rodman testified that he was Natural's sole stockholder at the time of the assignment (500-501). The assignment (R. 15) bears a certificate of acknowledgment by Rodman that he signed the assignment as president of Natural and that Natural's seal was affixed thereto and that he was authorized to sign the assignment by order of the Board of Directors (49-50). Assuming, however, without conceding, that the Board of Directors never met and never authorized the making of the assignment, neither this bankrupt (the debtor) nor Fishbeck has any standing to attack the assignment from Natural to the claimants since they represent neither Natural, Natural's stockholders, or Natural's creditors.

The rule is that the authority of an officer or agent of a corporation to do a particular act or make a particular contract may be questioned only by the corporation, its stockholders, or creditors, and where they do not raise an objection, another third person cannot do so or question the validity of the particular act or contract.

In *Eno* v. *Crooke* (10 N. Y. 60) a bank had a judgment against one Smith. The bank assigned the judgment to one Bonesteel without the Board of Directors of the bank having authorized the assignment, as required by statute. The Court of Appeals held that Smith, the debtor, could not question the transfer, saying:

> "None but the corporation or its stockholders or creditors can impeach a transfer of property by the corporation for the want of the previous action of the board of directors, and then only by direct action brought for that purpose. Strangers, the debtors of the bank, and others, have no interest in the question, and cannot go back of the assignment and collaterally impeach the transfer for the want of the formalities which have been imposed by statute for the benefit and protection of others."

2, 3. Assuming, without conceding, that the assignment was made without authority by Rodman to pay his individual debt, neither the bankrupt nor Fishbeck is in a position to attack the assignment on that ground.

In *Belden* v. *Meeker* (2 Lans. 470, aff'd 47 N. Y. 307), Osborn and Wells made their bond and mortgage to a bank. The bond and mortgage were assigned to plaintiff to secure the individual indebtedness of one Hallett, the president of the bank, and without any resolution of the board of directors authorizing the transfer of the bond and mortgage. It was held that the debtor could not raise this objection, the Court saying:

> "* * * although in fact the transfer was made to secure Hallett's individual indebtedness, yet in the absence of any objection on the part of the bank, its stockholders, or creditors, the debtor cannot raise the objection, that there was no consideration between Hallett and the bank for the assignment, or that the use of it, to secure the individual debt of Hallett, was a fraud upon the bank."

4. A. The assignability of claims is determined by the law of the state where the assignment is made. (2 Remington on Bankruptcy, 4th ed., § 896.)

The assignment here involved was executed and delivered in July 1943 at the office of the attorneys for Natural in Brooklyn.

Section 33, subdivision 4, of the Personal Property Law, as added by Laws 1941, chapter 330, effective September 1, 1941, provides:

> "An assignment hereafter made shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor."

This assignment was made after the effective date of the statute quoted and, therefore, no consideration was required to make it effective.

B. Even before the enactment of Section 33, subdivision 4, of the Personal Property Law a gratuitous assignment of an obligation was effective as against the obligor in that he was under a duty to discharge the obligation to the assignee rather than to the assignor. The obligor could not set up the absence of consideration as against the assignee's demands.

The Court of Appeals said in *Sheridan* v. *Mayor* (68 N. Y. 30 at p. 32):

> "Nor is it of any moment that no consideration was paid for the demand by the assignee. The assignor could give the demand to the plaintiff, or sell it to him for an inadequate consideration, or without any consideration. It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment or recovery by the assignee. * * * These views are well settled by authority." (Citing cases.)

If the assignee has title to the thing assigned—and that title has not been questioned in this proceeding—the consideration paid for the assignment is immaterial. (*Spencer* v. *Standard C. & M. Corp.,* 237 N. Y. 479, 481, and cases therein cited.)

Even if there was no consideration for the assignment, it does not lie with the bankrupt obligor to object. (*Schwartz* v. *Fletcher,* 238 App. Div. 554, 557.)

C. In any event, there was sufficient consideration for the assignment.

Any benefit that Natural received for the assignment was sufficient consideration. The assignment specifically provides that any suit instituted by the assignees shall be at *their* own cost and expense (45), yet Natural was to receive one-third of the proceeds of any recovery (46-47). Thus the assignment on its face contains a benefit to Natural.

Furthermore, it is not disputed that Rodman needed the stock held by Rice in order to reorganize Natural. It is not

disputed that Natural desired to be reorganized in order to obtain for itself its oil quota (268). Putting Natural in a position whereby it could be reorganized and thus obtain its oil allotment was a direct benefit to Natural, which would be sufficient consideration for the assignment of the claim against the bankrupt.

5. It is not the province of the bankruptcy court in the administration of the estate of the debtor to inquire whether the contract between Natural and its assignees (the claimants here) was in all respects valid and binding as between them. This bankrupt asserts no title to the claim and does not pretend to have any interest in it except as a debtor liable to pay to the proper holder of the claim. There is no party before the court who has any legitimate interest in questioning the assignees' title to the claim or who has, under the circumstances of the case, any right to be heard on that question. This bankrupt and one of the bankrupt's alleged creditors stand as mere volunteers, in behalf of others, not before the court, and who make no claim on their own account. This bankrupt owes the debt and, if it succeeds in defending on the grounds thus far urged, it may escape the payment of a just debt altogether.

Since as a matter of law neither the bankrupt nor the alleged creditor of the bankrupt (Fishbeck) may attack the assignment on any of the grounds raised by the petitioners, the writ of certiorari should be denied.

POINT IV.

SECTION 274 OF THE PENAL LAW IS INAPPLICABLE TO THE FACTS IN THIS CASE.

One of the respondents, Rudnick, is a New York attorney, and is one of the assignees who filed the claim objected to. The contention that the assignment was in violation of Section 274 of the Penal Law of New York was abandoned by petitioners, was disregarded by the Referee and by the

District Judge, and was revived before the Circuit Court of Appeals as a last gasp in a final attempt to expunge the claim. The objection is without merit.

There was no evidence introduced by petitioners at any of the hearings that Rudnick took this assignment "with the intent and for the purpose of bringing an action thereon."

In construing the statute involved, the Court of Appeals stated in *Moses* v. *McDivitt* (88 N. Y. 62), that the language was significant and indicated that:

> "a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose. As the law now stands, an attorney is not prohibited from discounting or purchasing bonds and mortgages and notes, or other choses in action, either for investment or for profit, or for the protection of other interests and such purchase is not made illegal by the existence of the intent on his part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection. To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent. The object of the statute, as stated by Chancellor Walworth in Baldwin v. Latson (2 Barb. Ch. 306), was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee."

In commenting upon the case then before it the Court of Appeals said at page 67:

> "The real question upon which the case turned was, whether the main and primary purpose of the purchase was to bring a suit and make costs, or whether

the intention to sue was only secondary and contingent, and the suit was to be resorted to only for the protection of the rights of the plaintiff, in case the primary purpose of the purchase should be frustrated."

In the absence of evidence on the subject, it could not be found as a fact that the statute was violated.

The contention is also invalid as a matter of law. The statute only prohibits an attorney taking an assignment with the intent and for the purpose of bringing "an action" thereon. If he takes it for the purpose of bringing a special proceeding thereon, it is not within the prohibition of the statute. (*Tilden* v. *Aitkin*, 37 App. Div. 28.) So it was held in the case cited that taking an assignment of a claim for the purpose of bringing a proceeding in the Surrogate's Court to compel defendant to account with a view of bringing about payment of the claim was not prohibited by the section. Since proceedings in bankruptcy are special proceedings (*Matter of Flower*, 167 N. Y. S. 778, not officially reported), taking an assignment of a claim in July 1943, when it was known by all the parties involved that a petition in bankruptcy had been filed against the obligor in November 1942 and that it had already been adjudicated, the assignment being for the purpose of filing a claim against the bankrupt in that proceeding, could not have been for the purpose of "bringing an action thereon" and was, therefore, not a violation of the statute.

CONCLUSION.

FOR ALL OF THE FOREGOING REASONS, THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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